FOR ARGUMENT

(8)

No. 90-1056

In The

Supreme Court of the United States

October Term, 1990

CHARLES W. BURSON, ATTORNEY GENERAL AND REPORTER FOR THE STATE OF TENNESSEE,

Petitioner,

v.

MARY REBECCA FREEMAN,

Respondent.

On Writ Of Certiorari
To The Tennessee Supreme Court

REPLY BRIEF OF PETITIONER

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1. The Respondent Is Incorrect In Her Assertion That Secondary Effect Analysis Should Not Be Applied To Electioneering Activities.

The substance of the respondent's argument concerning the applicability of the secondary effects analysis set forth in *City of Renton v. Playtime Theatres*, 475 U.S. 41, *reh'g denied*, 475 U.S. 1132 (1986) to political speech is as follows:

> Within the realm of first amendment-protected speech, this Court has sometimes sustained regulations which treat certain categories of "lesser" protected speech differently from speech which is afforded "greater" protection, based upon the subject matter of the expression. These decisions have primarily involved commercial speech, [citation omitted] and speech related to a variety of sexual topics [citations omitted]. However, this Court has never countenanced *more* stringent regulation of core political speech than other subjects of expression, and it should now reject the proposal to break new ground under the First Amendment urged by petitioner.

Respondent's Brief, pp. 9-10.

However, members of this Court have applied the secondary effects analysis to more than commercial or sexually related speech. *See Boos v. Barry*, 108 S.Ct. 1157, 1164 (1988) (O'Connor, J., joined by Stevens, J. and Scalia, J.) (political speech)[1]; *U.S. v. Kokinda*, 110 S.Ct. 3115, 3126 (Kennedy, J., concurring) (charitable speech); *Ward v. Rock Against Racism*, 109 S.Ct. 2746, 2754 (1989) (Kennedy, J., majority) (artistic speech). In each of these three cases, members of this Court have applied the secondary effects analysis of the *City of Renton* to more than just commercial or sexually-oriented speech.

Indeed, the progenitor of the *City of Renton* case upheld the federal statute prohibiting the knowing destruction or mutilation of selective service cards against a free speech challenge. *U.S. v. O'Brien*, 391 U.S. 367 (1968) (Warren, C.J., majority). In upholding the constitutionality of the law against a free speech claim, Chief Justice Warren indicated that a government regulation is sufficiently justified against a free speech challenge if: (1) "it is within the constitutional power of the government"; (2) "it furthers an important or substantial governmental interest"; (3) "governmental interest is unrelated to the

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[1] The petitioner asserts that the "plurality in *Boos* did not in fact apply 'secondary effects' analysis; and instead found no basis to do so because the government pointed only to the primary impact of the prohibited speech." Respondent's Brief, p. 12. This position ignores the fact that Justice O'Connor utilized the secondary effects analysis test and concluded that the justifications asserted by the government were not aimed at any secondary effect unrelated to speech but were pertaining to the primary effects of "the need to protect the dignity of foreign diplomatic personnel by shielding them from speech that is critical of their governments." *Boos*, 108 S.Ct. at 1164.

suppression of free expression"; and (4) "the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest." *Id.* at 377.

The respondent's concern about the "danger of applying *City of Renton*-type secondary effects analysis to purely political speech" focuses upon the government "point[ing] to *post hoc* pretextual 'secondary effects' reasons to justify what is otherwise an unmistakably content-based regulation." Respondent's Brief, p. 18. These fears are illusory where the regulation as in this case is view-point neutral, subject matter based and justified by state interests of the highest order, *i.e.*, maintaining order in and around the polling place in order to preserve the integrity of the election process.

When a regulation is view-point based, the concern in applying secondary effects analysis is that the government will suppress unpopular viewpoints by creating pretextual *ad hoc* justifications. *See City of Renton*, 475 U.S. at 59-60. (Brennan, J., dissenting). When a regulation is viewpoint neutral, but subject matter based, the concern with respect to such pretextual justifications vanishes especially where the justifications concern important state interests of protecting the purity of the election process.

For example, in *U.S. v. Eichman*, 110 S.Ct. 2404 (1990), this Court declared unconstitutional the Flag Protection Act of 1989 as being a content-based law. In particular, Justice Brennan concluded that "the Government's asserted *interest* is 'related to the suppression of free expression.' " *Id.* at 2408. The asserted government interest was "a perceived need to preserve the flag's status as a symbol of our nation and certain national ideals." *Id.* The respondent incorrectly asserts that if this Court adopts the petitioner's argument, then the Flag Protection Act could have been held valid because the government could have asserted a pretextual justification unrelated to the expressive activity, *i.e.* "a measure to promote fire safety or curb air pollution associated with smoke from burning United States Flags." Respondent's Brief, p. 18.

This argument ignores two points. First, the danger of pretextual justifications to render bans on unpopular speech content-neutral, *i.e.* pollution caused by burning flags, does not exist where the regulation is truly of an entire subject area such as electioneering. Since the regulation of an entire subject area of speech does not suppress a particular unpopular viewpoint, then there is no need for a pretextual content-neutral justification. Second, this Court has in a number of cases shown that the judiciary is quite capable of discerning when a legislative justification is pretextual or not. *See Secondary Effects and Political Speech: Intimations of Broader Governmental Regulatory Power*, 34 Vill. L. Rev. 995, 1019 (1989) ("[I]n several recent cases the Court has found an investigation into government motivation to be dispositive of the neutrality issue.") *See also, Barnes v. Glen Theatre, Inc.*, 111 S.Ct. 2456,

2462 (1991) (purpose of public indecency statutes to protect morals and public order). In this case, there is no doubt that the justifications for § 2-7-111 asserted by the petitioner are legitimate concerns as to the secondary effects created by electioneering in and around the polling place on election day and not pretextual.

2. The Respondent Is Wrong In Her Contention That The Justifications For Tenn. Code Ann. § 2-7-111 Are Primary Not Secondary.

The respondent misperceives the petitioner's justifications for § 2-7-111 by asserting that encouraging maximum participation by voters focuses on the "primary effect; the listeners' reactions to pure political speech." Respondents Brief, p. 14. It is not a voter's reaction to a campaign worker's "pitch" for his or her candidate at which § 2-7-111 is aimed. Rather, the statute is concerned with the secondary effects generated by electioneering of campaign workers in and around the polling place on election day.

Both the legislative history and proof in the record support the petitioner's position. Contrary to the assertions of the respondent, the legislative justifications for § 2-7-111 are not *post hoc*, pretextual rationalizations. The absence of any discussion by the respondent of the case of *Piper v. Swan*, 319 F. Supp. 908 (E.D. Tenn. 1970) *writ of mandamus denied*, 401 U.S. 971 (1971) cited by the petitioner in his main brief highlights the weakness of her argument. In the *Piper* case, a federal district court in Tennessee in interpreting the predecessor law to § 2-7-111 cited with approval other cases which stated the very

justifications relied upon by the petitioner in this case, *i.e.* "prevent[ing] interference with efficient handling of voters by the election board" and "avoid[ing] disturbance and disorder immediately about the polls." *Piper*, 319 F. Supp. at 911.

3. The Respondent's Argument That Tenn. Code Ann. § 2-7-111 Does Not Effectively Accomplish The Justifications Asserted By The Petitioner Is Irrelevant And Incorrect In Any Event.

The petitioner asserts that if the General Assembly is concerned about the interference with "ingress and egress to polling places, it is free to prohibit that without reference to speech." Respondent's Brief, p. 12. In particular, the respondent cites to Tenn. Code Ann. § 2-7-103 which prohibits individuals from preventing the performance of an election official's duties or a person attempting to exercise his or her right to vote. This argument is a back door attempt to graft the least restrictive means test upon the content-neutrality test. Whether the means employed by the government to remedy the secondary effects created by the speech is the most effective and least restrictive is irrelevant to the question of whether the justification is based upon the speech.

Furthermore, the statutes cited by the respondent do not remedy the secondary effects created by electioneering at a polling place on election day. The petitioner has already addressed this argument in his main brief concluding that such "after-the-fact-enforcement-mechanisms" ignore the "reality that during heated elections

violence can occur, *i.e.* altercations between voters and intoxicated poll watchers." Petitioner's Main Brief, pp. 34-35. The State's interest in ensuring fair and orderly elections provides an ample basis for the conclusion that § 2-7-111 is the most effective regulation by which order can be maintained in and around the polling place.

B. THE RESPONDENT IS WRONG IN HER CONCLUSION THAT TENN. CODE ANN. § 2-7-111 IS INVALID BECAUSE IT IS NOT NARROWLY TAILORED TO ADVANCE THE ENDS ASSERTED FOR IT.

The respondent maintains that § 2-7-111 is overinclusive because it "burden[s] more speech than is necessary to further the government's legitimate interest." Respondent's Brief, p. 21.[2] Specifically, it is argued that a ban on the display of campaign materials and solicitation of votes without regard to whether these activities disrupt the peace, order and decorum of the polling place or otherwise interfere with the conduct of the election is overbroad because it occurs outside of the polling place.

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[2] The respondent also takes the position that the statute is also underinclusive as not including every conceivable type of communication that might occur within the 100 foot boundary. Respondent's Brief, p. 23. This argument, of course, undercuts the respondent's least restrictive means argument. *Finzer v. Barry*, 789 F.2d 1450, 1465 (D.C. Cir. 1986) ("an alternative statute that restricts *every* exercise of expression regulated by the statute before us *and* other, presently unregulated, speech activities as well, is not . . . a less restrictive alternative.").

This view ignores the reality of a polling place on election day. What occurs outside the building itself naturally and obviously affects the activity within the building. A polling place is not composed of two distinct and separate parts – inside and outside. This linkage has been recognized by this Court in acknowledging the power of a state to regulate the conduct in and around the polling place in order to maintain peace, order and decorum there." *Mills v. Alabama,* 384 U.S. 214, 218 (1966). It is also recognized in the legislative history of § 2-7-111. *See* Petitioner's Main Brief, pp. 17-23.

The respondent's view is actually another attempt to incorporate a least restrictive means test into the significant state interest prong of the test for reasonable time, place and manner regulations. This argument is made despite this Court's holding that "a regulation of the time, place or manner of protected speech must be narrowly tailored to serve the governments legitimate content-neutral interest but that it need not be the least restrictive or least intrusive means of doing so." *Ward,* 491 U.S. at 798. All that is required of the statute is the promotion of an interest that would be achieved less effectively without the statute. *Id.* at 799. Yet the respondent attempts to examine § 2-7-111 "to see how necessary it is." Respondent's Brief, p. 22.

After quoting testimony regarding charitable organizations and interference statutes, the respondent concludes that § 2-7-111 "is underinclusive and that there are other statutes sufficient to correct the problems associated with solicitations outside polling places." Respondent's Brief, p. 23. This conclusion ignores other testimony that incidents of commercial and religious

solicitations have rarely if ever occurred. (Jt. App. at 40). The following testimony regarding the intimidation statutes was also overlooked by the respondent:

> Q. Do you think that those statutes would be sufficient to take care of the problems that would be created by the chaos and confusion that you said would occur?
>
> A. No, I do not. It would take care of a portion of it and that is the intimidation and interference. But as far as the poll officials being able to operate under the manner that they should, and get the vote count in the manner in which they should, or conduct the election in the manner in which they should, I do not feel that it would be – that it would cover that.

(Jt. App. at 46).

The statutes that prohibited intimidation and interference do not solve the problem that the State of Tennessee is addressing with § 2-7-111. Those statutes are designed to punish certain activity and are as previously stated after-the-fact-enforcement-mechanisms. The State should not be required to wait until after such incidents occur. By that time, the damage is done. The integrity of the election process is compromised. Surely a State is permitted to establish a reasonable time, place, and manner regulation designed to prevent the occurrence of incidents which jeopardize the integrity of the election process.

Moreover, the intimidation and interference statutes would not prevent the confusion and delay caused by crowded conditions and zealous campaign workers whether they are allowed inside the polling place or

permitted to crowd around the entrance of the polling place. Undoubtedly, § 2-7-111 is narrowly-tailored and serves the significant state interest previously mentioned by the petitioner that would be less effectively served in its absence. Petitioner's Main Brief, pp. 28-30.

C. CONTRARY TO THE RESPONDENT'S ASSERTION, TENN. CODE ANN. § 2-7-111 LEAVES OPEN AMPLE ALTERNATE CHANNELS OF COMMUNICATION.

The respondent overstates her cases when she contends that "there is no way [for her] to reach voters and be within the law" at certain polling places. Respondent's Brief, p. 24. This contention ignores testimony that the respondent has successfully solicited votes at polling places outside the 100 foot boundary for the past seventeen years, and there have been no problems at those polling places mentioned by the respondent. (Jt. App. at 42). The respondent also mentions a voter's "right to receive communications" and claims that the State is attempting to limit what a voter may hear. Respondent's Brief, p. 18.

"The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be an opportunity to win their attention." *Kovacks v. Cooper*, 336 U.S. 77, 87, *reh'g denied* 336 U.S. 921 (1949) (Reid, J., plurality); *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981). What the respondent desires is a chance to solicit every single voter who enters a polling place. Under § 2-7-111, she has a reasonable opportunity to reach all willing listeners who

come to the polling place. Voters simply walk by the solicitors on their way to vote. As for those voters parking within the 100 foot boundary who wish to exercise their right to receive additional information from a solicitor, they may take a few steps over to the campaign worker for further discussion. Campaign workers clearly have a viable alternative to soliciting within the 100 foot boundary.

The respondent has two replies to this argument. First, she argues that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schad v. Borough of Mount Ephram*, 452 U.S. 61, 76-77 (1981), quoted in Respondent's Brief, p. 24. A maximum distance of 100 feet is hardly "some other place". Furthermore, case law indicates that the alternate channels of communication test does in fact permit going some other place, as in *City of Renton*, or limiting First Amendment activity to certain specified areas within a larger area as in *Heffron*. The respondent's argument also presumes that the area within the 100 feet of the entrance to a polling place is an appropriate area. The State of Tennessee maintains that it is not an appropriate area for all of the previously discussed reasons.

Second, the respondent indicates that the other avenues of communication are more burdensome. Respondent's Brief, p. 24. What the respondent really desires is the absolute right to conduct "in person solicitation at polling places," because it constitutes "the most effective means of communication for many local offices." Respondent's Brief, p. 25. All that is required for an adequate alternate channel of communication is "a reasonable

opportunity" to engage in the speech. *City of Renton*, 475 U.S. at 54. The fact that the 100 foot boundary "may reduce to some degree the potential audience for the respondent's speeches is of no consequence, for there has been no showing that the remaining avenues of communication are inadequate." *Ward*, 109 S. Ct. at 2760.

II. THE INTERFERENCE AND INTIMIDATION STATUTES CITED BY THE RESPONDENT ARE NOT LESSER RESTRICTIVE ALTERNATIVES TO ACCOMPLISHING THE STATE'S COMPELLING INTEREST IN MAINTAINING ORDER IN AND AROUND THE POLLING PLACE ON ELECTION DAY.

The respondent does not separately address the petitioner's argument that even if this Court determines that § 2-7-111 is not a reasonable time, place and manner regulation, it should still be held valid because there are no lesser restrictive means of accomplishing the State's interest in preserving the integrity of the election process at the polling place on election day. The respondent does argue that other statutes in Tennessee are able to accomplish the State's interest through a less restrictive means stating:

> This Court need not speculate about the law of Tennessee since the State's Supreme Court has found in this very case that other statutes make the restrictions imposed here unnecessary to advance those ends. Thus, it concluded [citation omitted] that Tenn. Code Ann. §§ 2-19-101 and 2-19-115 already prohibit voter interference and intimidation, independent of any restrictions on pure speech. In addition, Tenn. Code Ann. § 2-19-103 criminalizes any action, again without reference to speech, taken "for the purpose of preventing any persons performance of his duties under this title or the exercise of his rights" under the election code. Most significantly for the claims made about possible confusion and mistakes in the casting of ballots, the persons who may enter the actual polling place during voting hours are limited by Tenn. Code Ann. § 2-7-103 to election officials, voters, persons properly assisting the voters, the press, poll watchers appointed under § 2-7-104 and others bearing written authorization from the county election commission.

Respondent's Brief, p. 22.

The petitioner has already responded to the inadequacy of the criminal laws prohibiting voter interference or intimidation. Petitioner's Main Brief, p. 34. With respect to the respondent's argument that only certain individuals are allowed inside the polling place, such an argument ignores the problems which would be created by allowing campaign workers to crowd around the entrance to a polling place on election day. None of the statutes cited by the respondent prohibited campaign workers from soliciting one foot outside of the building. Furthermore, the voter interference and intimidation statutes would not adequately serve the State's interest in preventing delay and confusion around the polling place because such statutes are an after-the-fact-enforcement-mechanism[3].

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[3] Since under Tenn. Code Ann. § 2-7-103(c) no policeman or law enforcement officer may come within ten feet of the

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III. CONTRARY TO THE ASSERTIONS OF THE RESPONDENT, THE AREA OF LAND WITHIN 100 FEET OF A POLLING PLACE ON ELECTION DAY IS NOT A PUBLIC FORUM.

The respondent argues that in many instances, the 100 foot radius from the entrance of a polling place extends "onto public streets and sidewalks" and "there is no proof in the record that any street or sidewalk near two polling places is distinguishable from any other street or sidewalk in Nashville and Davidson County." Respondent's Brief, pp. 15-16. The respondent ignores § 2-7-111(a) which requires the election officials to "measure off 100 feet from the entrances to the building in which the election is to be held and *place boundary signs at that distance.*" (emphasis added)

The petitioner does not dispute the fact that individuals may pass within the 100 foot boundary of a polling place on election day. However, the land within the 100 foot boundary is analogous to postal sidewalks mentioned in the *Kokinda* case:

> No postal service regulation opens postal sidewalks to any First Amendment activity. To be sure, individuals or groups have been permitted to leaflet, speak and picket on postal premises [citation omitted], but a regulation prohibiting disruption, [citation omitted] and a practice of

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entrance of a polling place except upon the request of an election official to make an arrest or to vote, then a police officer could not be present at the entrance to a polling place until after unlawful disruption or interference had occurred.

> allowing some speech on postal property do not add up to the dedication of postal property to speech activities.

U.S. v. Kokinda, 110 S.Ct. at 3121.

On election day in Tennessee, both private and public buildings in the State of Tennessee are turned over to the control of election officials. Tenn. Code Ann. § 2-3-107(b)(1) provides that county election commissions are requested to arrange for the "use of public schools and other public buildings for polling places" insofar as practical. When a public building cannot be used, rent may be paid for private buildings. Tenn. Code Ann. § 2-3-107(b)(3). Thus, the area inside of each building used as a polling place on election day and within 100 feet of the entrance is dedicated to the express activity of conducting elections. *Cf. Perry Education Assn. v. Perry Local Educator's Assn.*, 460 U.S. 37, 47 (1983) (use of teachers' mailboxes in public schools by outside civic organizations did not render such mailboxes a public forum).

Furthermore, there is no statute specifically authorizing any type of expressive activity either commercial, political, religious, or artistic within 100 feet of a polling place on election day. In order to maintain order in the election process, electioneering is prohibited within 100 feet to the entrance of the polling place. Thus, the situation in this case is even stronger than in *Kokinda* in that no speech activities are even specifically authorized. Accordingly, § 2-7-111 should be viewed as a reasonable non-public forum regulation.

CONCLUSION

Based upon the foregoing authorities and analysis, the petitioner asks this Court to reverse the decision of the Tennessee Supreme Court and hold that § 2-7-111 does not violate the Free Speech Clause of the First Amendment.

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